FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

July 29, 1999

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of EARL CHARLES ALBU	: : : : :	
v.	:	Docket No. WEVA 99-85-D
CHICOPEE COAL COMPANY, INC.	: : :	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

DECISION

BY THE COMMISSION:

In this discrimination proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"), respondent Chicopee Coal Company, Inc. ("Chicopee") has filed a petition for review of Administrative Law Judge Jerold Feldman's June 30, 1999, Order of Temporary Reinstatement issued pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2) and 29 C.F.R. § 2700.45. 21 FMSHRC 673 (June 1999) (ALJ). We grant respondent's petition for review and, for the reasons that follow, affirm the judge's order requiring the temporary reinstatement of Earl Charles Albu ("Albu").

Complainant Albu was a miner employed by Chicopee until his discharge on January 26, 1999. On April 21, 1999, he filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") pursuant to section 105(c) of the Mine Act. Following an investigation, the Secretary of Labor determined that the discrimination complaint filed by Albu was not frivolous. On April 30, 1999, the Secretary filed an application for temporary reinstatement of Albu. On June 2, an evidentiary hearing on the application was held. On June 30, the judge issued his decision in which he concluded that the complaint was not frivolous.

The Secretary alleges that Albu was discharged because of statements that he made during a safety meeting on January 25, 1999. 21 FMSHRC at 678. Respondent contends that Albu was discharged because of his alleged cursing on a Citizen Band radio, and because his

services were no longer needed. C. Pet. at 4.

As the Commission has previously stated, "The scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought." *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd sub nom. Jim Walter Resources, Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990). Judge Feldman held an evidentiary hearing and considered the testimony of four witnesses in addition to the complainant. He determined that the complaint had not been frivolously brought.

The only issue before us is whether Albu's discrimination complaint was frivolously brought. As stated by the judge, evidence exists in the record that Albu engaged in protected activity. 21 FMSHRC at 679. Albu allegedly made complaints during the January 25 meeting that berms were not being replaced, that miners working were not certified, and that some of the equipment used was "junk." *Id.* at 677; Tr. 146-47, 246. Albu's supervisor, Lewis Franklin Bates, testified that, as to the equipment, Albu complained about the conditions of the brakes on the trucks. Tr. 32, 57. In addition, as the judge noted, Albu had a history of complaining about equipment at the site. 21 FMSHRC at 679; Tr. 246, 259. Moreover, there is evidence in the record of adverse employment action, that is, Albu's discharge on January 26. 21 FMSHRC at 679; Tr. 146-47, 246. Finally, there is evidence in the record that the adverse action was motivated in any part by Albu's protected activity. 21 FMSHRC at 679. At the time that he discharged Albu, Gary Rutherford, a foreman employed by Chicopee, allegedly stated, "I just wish that you hadn't said what you said yesterday morning." Tr. 146-47, 235-36. In addition, the time that elapsed between the protected activity and Albu's discharge was very brief, which may demonstrate that the discharge was motivated at least in part by the protected activity. *Secretary on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981); *Donovan v. Stafford Const. Co.*, 732 F.2d 954, 960 (D.C. Cir. 1984) ("the fact that the [c]ompany's adverse action against [a miner] so closely followed the protected activity is itself evidence of an illicit motive").

In its petition for review of the judge's temporary reinstatement order, Chicopee does not dispute the judge's determination that Albu's safety related complaints during the January 25 meeting was protected activity, or that Albu's discharge on January 26 constituted adverse employment action. Rather, it disputes the judge's determination that the adverse action was motivated in any part by the protected activity based on his inference that Paul Moran, Chicopee's president, or Robert Warnick, Chicopee's vice-president, had knowledge that Albu engaged in protected activity. C. Pet. at 1, 5-7. It relies upon evidence in the record in which Warnick denies having any knowledge of Albu's statements during the January 25 meeting. *Id.* at 6; Tr. 237-38, 241. Contrary to Chicopee's assertions, in a temporary reinstatement proceeding the Secretary was not required to prove that Warnick or Moran had knowledge of Albu's protected activity. Rather, she was required to show only that Albu's complaint was nonfrivolous.

On the issue of whether Albu's discharge was motivated in any part by his protected activity, there is both supporting and detracting evidence in the record. As noted by Chicopee, Warnick denied knowing the statements that Albu allegedly made during the January 25 meeting. Tr. 237-38, 241. On the other hand, there is evidence that Rutherford, who appears to have attended the January 25 meeting, stated when he discharged Albu that he wished Albu "hadn't said what [he] said yesterday morning."[1] Gov't Ex.3; Tr. 146-47. Such testimony indicates that a nonfrivolous issue exists as to whether Albu's discharge was motivated in any part by his protected activity. It was not the judge's duty, nor is it the Commission's, to resolve the conflict in testimony at this preliminary stage of proceedings. *See Jim Walter Resources*, 920 F.2d at 744 ("The temporary reinstatement hearing merely determined whether the evidence mustered by the miners to date established that their complaints are nonfrivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement."). We thus conclude that the judge's determination that the complaint was not frivolous is supported by substantial evidence and is consistent with applicable law. We intimate no view as to the ultimate merits of this case.

[1] On the complaint filed with MSHA, Albu did not mention Rutherford's comment and stated that Rutherford said nothing beyond that Albu was no longer needed. Tr. 172-73. When that inconsistency was brought to Albu's attention, however, he stated that he stood by his testimony that Rutherford made the additional comment. Tr. 173.

Accordingly, the judge's order requiring the temporary reinstatement of Albu is affirmed.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

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